United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7162

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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MILLICENT LINDEN

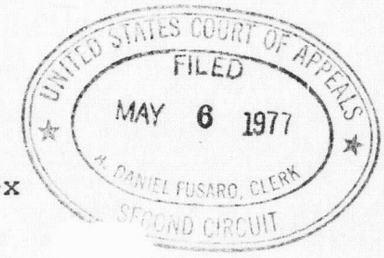
Plaintiff-Appellant

-against-

DAVID FOX and SAMUEL GRAFF,

Defendant-Appellees

----------x



BRS

DEFENDANTS-APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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MILLICENT LINDEN

Plaintiff-Appellant 76 CIV. 4403

-against-

DAVID FOX and SAMUEL GRAFF,

Defendants-Appellees.

----------x

DEFENDANTS-APPELLEES' BRIEF

STATEMENT

This is an appeal by the plaintiff from an order of Judge Duffy, dated March 11, 1977, granting defendants' motion to dismiss plaintiff's complaint.

FACTS

Plaintiff's complaint alleges that defendants are attorneys, that they represented a client in a Civil Court action brought by the plaintiff, that they violated two Sections of the United States Constitution by tampering with original records and falsifying statements and that they engaged in illegal practices and perjured themselves, all of which caused severe distress and anguish. Plaintiff

claims $1,000,000 in damages.

Defendants moved to dismiss plaintiff's complaint on various grounds. The affidavit of SEYMOUR YANOFSKY states that plaintiff sued a Dr. Novich for mal-practice, that the case was defended by the Doctor's insurance company and a verdict was rendered in favor of the defendant, which was affirmed by the Appellate Term. Later she started another suit against Dr. Novich based on the same facts, but this second suit alleged willful and intentional conduct, but did not allege negligence. The insurance company disclaimed liability and the firm of which the two defendants are members, defended Dr. Novich. The case was dismissed by Judge Schackman in Civil Court.

Thereafter plaintiff started a Federal Court action against several Judges of the Civil Court which was dismissed.

Mr. Yanofsky's affidavit also states that the complaint is barren of any suggestion that a proper Federal question was involved in any of the actions including this one.

Defendants' motion was granted by Judge Duffy with a statement that no Federal cause of action is stated in the complaint and that the complaint states that all parties are residents of New York and therefore diversity of

citizenship is lacking.

POINT I

AS THE COMPLAINT ALLEGES NO DIVERSITY OF CITIZENSHIP, THE DISTRICT COURT HAD NO JURISDICTION AND THE COMPLAINT WAS PROPERLY DISMISSED.

Section 1332 of the United States Code provides:

> "1332. Diversity of Citizenship - Amount in controversy - Costs - (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between - (1) citizens of different States; . . . . . " (P. 331)

It is well settled that an allegation of diversity of citizenship is necessary to give the Federal Court jurisdiction.

United States vs. Admas 76 U.S. (9 Wall) 554
Anderson vs. Watt 138 U.S. 694
State Highway Comm. vs. Utah Construction Co. 278 U.S. 194

Not only was there no allegation in the complaint of diversity of citizenship, but the complaint expressly states:

> "Defendants' address is: 277 Broadway, New York, New York 10007; Plaintiff's address is: 500 East 74th St., New York, N.Y. 10021."

It is true that citizenship and residence may be different, however, in the absence of any allegation

regarding citizenship and the express allegation in the complaint of addresses (presumably meaning domicile) it is to be assumed that both parties were citizens of the same state. Jardine vs. Intehar 213 Fed. Supp. 598.

Under the circumstances Judge Duffy was correct in his statement that "diversity of citizenship is lacking" and dismissing the complaint.

POINT II

NO FEDERAL CAUSE OF ACTION WAS ALLEGED IN THE COMPLAINT.

It is difficult to tell just what plaintiff is claiming against the defendants. The paragraphs of the complaint are not numbered but the first paragraph states that defendants have violated two Articles of the Constitution causing distress and anguish. The first paragraph does not attempt to say in what manner defendants violated those Articles.

The second paragraph gives the addresses of both plaintiffs and defendants as quoted above.

The third paragraph merely states that the defendants represented a client in an action in Civil Court brought by the plaintiff.

The fourth paragraph states that defendants engaged in gross, flagrant deception at all times; that they

tampered with original records and falsified statements. Nothing contained in this paragraph involves any Federal cause of action. Any such actions on the part of a lawyer can be handled by State Courts and Authorities.

The fifth paragraph states that defendants falsified records and perjured themselves, thus obstructing Justice. This, of course, is a matter which can be handled by State Courts.

The sixth paragraph criticizes the Grievance Committee of the New York Bar Association and the Criminal Court, but makes no mention whatever of the defendants being involved.

The last paragraph states that defendants caused distress and anguish by engaging any support of several Judges. There is nothing in this paragraph to suggest any Federal cause of action.

Judge Duffy was correct in stating that "the complaint fails to reveal the existence of a federal cause of action."

POINT III

THE ORDER APPEALED FROM DISMISSING THE COMPLAINT SHOULD BE AFFIRMED.

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Walter G. Evans, Esq.
Of Counsel

STATE OF NEW YORK, COUNTY OF ss.: CERTIFICATION BY ATTORNEY

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: 19 .....

AFFIRMATION OF SERVICE BY MAIL BY ATTORNEY

STATE OF NEW YORK, COUNTY OF NEW YORK **ss.:**

The undersigned attorney associated with the attorneys of record for Defendants-Appellees in this action affirms that the following statement is true, under penalty of perjury:

On the 5th day of May 1977 he served the within Defendants-Appellees'
upon Millicent Linden ~~attorney for~~
Plaintiff Pro Se in this action, at 500 East 74th Street, New York, N.Y.
the address designated by said attorney(s),

by depositing a true copy thereof securely enclosed in a postpaid properly addressed wrapper, in a post office box official depository under the exclusive care and custody of the United States Post Office Department at 15 Park Row in the County of New York, New York.

Dated: May 5, 1977 19

Seymour Yanofsky